UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MERMAID MANOR HOME FOR ADULTS, LLC /
MERMAID MANOR ASSISTED LIVING PROGRAM[1]
Employer

and Case No. 29-RC-11575

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 348-S, CLC
Petitioner

and

DISTRICT 6, INTERNATIONAL UNION OF
INDUSTRIAL SERVICE TRANSPORT AND
HEALTH EMPLOYEES
Intervenor

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Mermaid Manor Home for Adults, LLC / Mermaid Manor Assisted Living Program, is engaged in providing health care services. The Petitioner filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act.

The Petitioner seeks to represent a unit of all full-time and regular part-time employees employed at the Employer's facility located at 3602 Mermaid Avenue, Brooklyn, New York, but excluding all executives, managers, guards and supervisors as

[1] The parties' names appear as amended at the hearing. There is sufficient evidence of common ownership and management, centralized control of labor relations policies, and integration of operations, to establish that Mermaid Manor Home for Adults, LLC, and Mermaid Manor Assisted Living Program are a single employer.

defined in the Act.[2] The Intervenor intervened on the basis of its collective bargaining agreements with the Employer encompassing the petitioned-for unit.

A hearing was held before Kevin Kitchen, a Hearing Officer of the Board.[3] Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

The parties stipulated that the Intervenor is a statutory labor organization, that the Employer is subject to the Board's jurisdiction, and that the unit sought by Petitioner is appropriate. Further, the parties agreed that the Employer only employs one Registered Nurse ("RN"), Beatrice Tria. The Petitioner and the Employer contended that this lone RN is a statutory supervisor or a manager. At the outset of the hearing, the Intervenor repeatedly and emphatically agreed with this characterization, but declined to enter into a formal stipulation to this effect. In addition, the Intervenor took the position that the Petitioner is not a statutory labor organization. The Petitioner and the Employer took the contrary position.

At the hearing, Eric Roman, a field organizer employed by the Petitioner, testified regarding the Petitioner's labor organization status. Bert Fried, an owner and administrator of the facility, testified pursuant to a subpoena issued by the Hearing Officer, regarding the RN's alleged supervisory status and the number of employees in the bargaining unit. In addition, Fried was asked several questions as to whether the RN's assistant, Lioudmila

[2] The unit description appears as amended at the hearing. Historically, the employees of Mermaid Manor Home for Adults, LLC, and Mermaid Manor Assisted Living Program have been represented in two separate bargaining units. However, the parties stipulated that the combined unit sought by Petitioner is an appropriate one.

[3] The Intervenor moved for the recusal of the Hearing Officer, in light of a pending unfair labor practice case in which the Hearing Officer is involved. However, there is no evidence of bias, or a conflict of interest on the part of the Hearing Officer. Accordingly, the motion was properly denied.

Terntieva, has any supervisory duties, but the parties did not formally take positions on this issue. No other witnesses testified at the hearing, and none of the parties filed briefs.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the Petitioner is a statutory labor organization, and that the RN (Beatrice Tria) is a statutory supervisor. The facts and reasoning that support my conclusion are presented in detail below.

FACTS

Labor Organization Status of Petitioner

Roman testified that the Petitioner files numerous representation petitions at the Board's regional offices, leading to Board elections. It negotiates contracts with employers, pertaining to employees' terms and conditions of employment, and processes grievances on behalf of the employees it represents.

The Petitioned-For Bargaining Unit

Fried testified that Mermaid Manor Home for Adults ("HFA") and Mermaid Manor Assisted Living Program ("ALP") share the same four-story building. The third and fourth floors have 50 residential rooms on each floor, occupied by HFA residents. The second floor is occupied by 37 ALP residents and 13 HFA residents. The first floor is also shared by HFA and ALP. It contains offices, as well as a recreation room, kitchen and dining room which are shared by all of the residents.

The existing collective bargaining agreement between the Intervenor and HFA covers "all employees," but excludes guards, confidential employees, supervisors, executives, and temporary employees. The existing collective bargaining agreement between the Intervenor and ALP covers "all employees, including RN-LPN," with the same exclusions. The effective dates of both agreements are from June 21, 2005, until June

20, 2008.[4] Fried estimated that HFA employs 32 or 33 employees, and ALP employs 11 or 12 employees.

Many of these employees perform work for both HFA and ALP. In addition, a visiting nurse service and a mental health provider, both unrelated to the Employer, perform services for both ALP and HFA residents. The number of visiting nurses and mental health workers supplied by these unnamed entities was not disclosed.

The employees performing work for both HFA and ALP include five employees who work in the food service area during the day shift, including two dining room aides, a chef, a chef's helper and a dish washer. During the night shift, from 11:00 p.m. until 7:00 a.m., a sixth food service employee cleans the kitchen. In addition, there are an unspecified number of dieticians.

Fried testified that there is only one maintenance employee, and one employee who conducts recreational activities for all 150 residents. In addition, there are five housekeepers, who cover the day, evening, and night shifts. During the day, a receptionist sits at the front desk, answers the telephone, and does some paperwork.

According to Fried, there are 8 or 9 licensed Home Health Aides ("HHAs") who work exclusively for ALP, because the ALP residents need more personal care services than the HFA residents. He stated that 7 or 8 unlicensed personal care aides are employed by HFA, and are supervised by Fried and his assistants. One of the unlicensed personal care aides "assists with medications" from 3:30 a.m. until 11:00 p.m., during the evening

[4] The Intervenor argued that these agreements operate as a bar to the instant petition. However, the petition was filed on March 18, 2008, 94 days before the expiration of the collective bargaining agreements. It is well settled that under the Board's contract bar rules, "all petitions filed more than 90 days but not over 120 days before the terminal date of any contract involving a health care institution" are timely. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

shift. In addition, a "medication aide" dispenses medication to both ALP and HFA residents, and records information in a log when residents' medications are renewed.

An evening shift supervisor works at the front desk, answers the telephone, and gives out medication at bedtime, which is at 8:00 p.m. In addition, when a resident becomes ill, the evening shift supervisor telephones either the administrator, the assistant administrator, the nurse, or an ambulance. Fried stated that the shift supervisors do not hire, fire, suspend or discipline employees, or grant time off. The total number of shift supervisors was not disclosed.

Management Staff

Fried testified that he is a partner in both ALP and HFA, and determines labor relations policies for both entities. He and Malka Zilban are the administrator and assistant administrator, respectively, of both ALP and HFA. Reporting to Zilban on the ALP side are Beatrice Tria, the Director of Patient Services, and Lioudmila Terntieva, Assistant Director of Patient Services, according to Fried. Terntieva was previously an HHA. Morty Deitcher, an assistant administrator or manager, reports to Zilban on the HFA side.

Fried testified that he supervises the kitchen staff, housekeeping staff, and "maintenance staff."[5] In Fried's absence, these employees report to Zilban or Deitcher.

The Employer's quarterly governing authority meetings are attended by Fried, Zilban, Tria, and Dr. Daniel Ziedman, who also provides periodic medical check-ups to the residents. The governing authority meetings are not attended by Terntieva or Deitcher.

[5] According to Fried, there is just one maintenance employee.

Supervisory Issue

Beatrice Tria

According to Fried, Tria hires, fires, disciplines and promotes the HHAs, trains, oversees and schedules them, grants vacation time, authorizes overtime, adjusts grievances, drafts a plan of care for each resident, and ensures that the plan of care is effectuated by the HHAs. Fried stated that she performs these functions without consulting with other members of management, and that she is held accountable for the actions of the employees she supervises. Fried asserted that the performance of Tria's subordinates is a factor in her performance appraisal.[6]

In addition, Tria writes evaluations of the HHAs. According to Fried, Tria uses these evaluations when making supervisory decisions regarding discipline and termination, bonuses and increases in salary.

In support of these assertions, the Employer submitted various exhibits demonstrating that Tria has hired, disciplined, and discharged HHAs. All of these documents were signed by Tria, and were not co-signed by any other member of management. In addition, the Employer's documentation demonstrates that on October 2, 2005, Tria was planning to "request an update" to Terntieva's job description. On September 3, 2007, Tria gave Terntieva a raise because "her performance as Administrative Ass't for Mermaid Manor ALP is excellent." Thus, the documentation appears to indicate that Terentieva was promoted to the position of administrative assistant, not "Assistant Director of Patient Services" as testified by Fried.

The collective bargaining agreement provides examples of "just cause" for discharge, including "incompetence" and "excessive lateness and absenteeism."

[6] Tria's performance appraisal was not supplied at the hearing.

"Excessive" and "incompetence" are not defined, and it appears that Tria has broad discretion with regard to discharge decisions. In one example, Tria gave an employee a written warning in February, 2005, for leaving the facility without telling a supervisor. One year later, Tria discharged that same employee for failing to "return to Mermaid Manor ALP for her duties." In the employee's performance appraisal, Tria gave this individual a "4" for "needs improvement," in four out of eight factors, including "punctuality/attendance" and "judgment/responsibility."

The Employer also provided a five-page position description for the Director of Patient Services, signed by Tria on January 4, 2005. The Position Summary and Personnel sections of the position description state that the Director of Patient Services is responsible for recruitment, hiring, discipline, firing, and supervision. Inexplicably, the position description emphasizes home health care functions, to be performed for the "Licensed Home Care Service Agency."

Lioudmila Terntieva

Fried testified that when Tria is not present,[7] Terntieva assigns HHAs to their daily job responsibilities, shifts their assignments among residents if necessary, assigns overtime, and authorizes time off. He stated that Terntieva is present during job interviews, and that she has disciplined employees. He did not provide specific examples, or explain Terntieva's decision-making process regarding the assignment or disciplining of employees.

[7] According to Fried, Tria works Sundays through Thursdays, from 7 a.m. until 3:00 p.m., and Terntieva works Monday through Friday, 7:00 a.m. until 4:00 p.m., and half a day on Saturdays.

DISCUSSION

Labor Organization Status of Petitioner

Section 2(5) of the Act provides the following definition of "labor organization":

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

An incipient union which is not yet actually representing employees may be accorded Section 2(5) status if it admits employees to membership and was formed for the purpose of representing them. *Coinmach Laundry Corp*., 337 NLRB 1286 (2002); *see Butler Manufacturing Company*, 167 NLRB 308 (1967); *see also The East Dayton Tool & Die Company*, 194 NLRB 266 (1971). Even if such a labor organization becomes inactive without ever having represented employees, it is deemed to have been a statutory labor organization if its organizational attempts "[c]learly…envisaged participation by employees," and if it existed "for the statutory purposes although they never came to fruition." *Comet Rice Mills*, 195 NLRB 671, 674 (1972). Moreover, "structural formalities are not prerequisites to labor organization status." *Yale New Haven Hospital*, 309 NLRB 363 (1992)(no constitution, by-laws, meetings or filings with the Department of Labor); *see Betances Health Unit*, 283 NLRB 369, 375 (1987)(no formal structure and no documents filed with the Department of Labor); *Butler Manufacturing Company*, 167 NLRB at 308 (no constitution, bylaws, dues or initiation fees); *East Dayton*, 194 NLRB at 266 (no constitution or officers).

In the instant case, the record establishes that the Petitioner meets the statutory definition of labor organization. The Petitioner exists for the purpose of "dealing with employers" concerning the matters itemized in Section 2(5), and its organizational efforts "clearly envisage participation by employees." *Comet Rice Mills*, 195 NLRB 671 (1972).

Accordingly, I find that the Petitioner is a labor organization as defined in section 2(5) of the Act.

Supervisory Issue

In enacting Section 2(11) of the Act, Congress intended to distinguish "between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in Providence Hospital,* 320 NLRB 717, 725 (1996). Accordingly, individuals are statutory supervisors only if (1) they hold the authority to engage in one of the twelve supervisory functions set forth in the Act, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *Kentucky River Community Care, Inc*., 121 S.Ct. 1861, 1867 (2001). The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River*, 121 S.Ct. at 1866. In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985). When "there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria." *Property Markets Group, Inc*., 339 NLRB 199, 205 (2003).

To establish that an alleged supervisor uses "independent judgment," the individual "must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc*., 348 NLRB No. 37, slip op. at 5 (2006). A judgment "is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or

rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood, supra., slip op*. at 5-6. The use of "independent judgment" must be demonstrated through evidence of "particular acts and judgments," *North Shore Weeklies, Inc*., 317 NLRB 1128 (1995), rather than through "general, conclusory claims." *Crittenton Hospital*, 328 NLRB 879 (1999). The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees," does not confer supervisory status. *Chicago Metallic*, 273 NLRB at 1689; *see Kanawha Stone Company, Inc.,* 334 NLRB 235 (2001).

Beatrice Tria

The record reflects that Tria has the authority to hire, promote (or effectively recommend promotion), discharge, assign, reward, discipline, and responsibly direct employees, and adjust their grievances. The documentation submitted by the Employer indicates that she uses independent judgment with regard to at least some of these supervisory indicia, in that she exercises her supervisory authority independently of the control of others, her decisions are not controlled by detailed instructions, and she "forms an opinion or evaluation by discerning and comparing data" when choosing which employees to hire, promote and reward.

Accordingly, I find that Tria is a supervisor as defined in Section 2(11) of the Act.

Lioudmila Terntieva

Fried's sparse testimony regarding Terntieva's job description is insufficient to establish that she is a supervisor. Fried testified that Terntieva is present during job interviews, but there is no evidence that she makes hiring decisions, or that she makes

effective recommendations regarding hiring decisions. Fried asserted that Terntieva makes assignment decisions on Fridays and Saturdays, in Tria's absence, but there is no evidence that Terntieva uses independent judgment in doing so. Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. *See Harborside Healthcare, Inc*., 330 NLRB 1334 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999). The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *See Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Such routine duties as "shifting employees around to get projects done," asking off-duty employees to fill in for absent employees, or adjusting meal break schedules, do not require independent judgment, and are thus non-supervisory. *See Los Angeles Water and Power Employees' Association*, 340 NLRB 1232 (2003); *Health Resources of Lakeview, Inc*., 332 NLRB 878, 879 (2000); *Hexacomb Corporation,* 313 NLRB 983, 984 (1994).

Although Fried testified that Terntieva has disciplined employees, he did not provide specific examples or documentation, or explain what he meant by "discipline." The power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." *Crittenton Hospital*, 328 NLRB at 879 (citing *Passavant Health Center*, 284 NLRB 887, 889 (1987). Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher,* 214 F.3d at 265 (citing *Meenan Oil Co*., 139 F.3d 311 (2nd Cir. 1998); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P*., 323 NLRB 890 (1997). To

confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health and Rehabilitation Services, Inc*., 335 NLRB No. 54 (2001). The record fails to establish that this has ever occurred.

Moreover, the documentation submitted by the Employer indicates that Terntieva is an administrative assistant, not the "Assistant Director of Patient Services" as testified by Fried.

Accordingly, I find that the record does not establish that Terntieva is a supervisor as defined in Section 2(11) of the Act.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that the Employer is a domestic corporation, with its principal office and place of business located at 3602 Mermaid Avenue, Brooklyn, New York, herein called its Brooklyn facility, where it is engaged in the operation of a residential home for adults and assisted living facility. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $100,000, and purchased and received at its Brooklyn facility, goods, materials and supplies valued in excess of $5,000, directly from entities located outside the State of New York.

Based on the stipulations of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act and a health care

institution within the meaning of Section 2(14) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The stipulations of the parties, and the record evidence herein, establish that both United Food and Commercial Workers Union Local 348-S, CLC, and District 6, International Union of Industrial Service Transport and Health Employees, are labor organizations within the meaning of Section 2(5) of the Act, in that they are organizations in which employees participate, and which exist, in whole or in part, for the purpose of dealing with employers concerning wages, hours and other conditions of employment. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate bargaining unit:

> All full-time and regular part-time employees employed at the Employer's facility located at 3602 Mermaid Avenue, Brooklyn, New York, but **EXCLUDING** all executives, managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees

engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union Local 348-S, CLC, by District 6, International Union of Industrial Service Transport and Health Employees, or by neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the

undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **June 4, 2008**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 11, 2008.**

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed. The request for review may not be filed by facsimile.

Dated: May 28, 2008, Brooklyn, New York.

"/s/ {Alvin P. Blyer]"

National Labor Relations Board
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Brooklyn, New York 11201